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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

ALAN G. LANCE

May 29, 1997

Cliff Villa
Office of Regional Counsel
U.S. EPA, Region 10.
1200 Sixth Avenue
Seattle, WA 98101

Nancy Roberts
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186

Tom Greenland
Environmental Counsel
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, NE 68179-0001

Re: Haul Road MOA

Dear Counsel:

The latest draft of the Memorandum of Agreement regarding the haul road is enclosed for your review and comment. This draft incorporates changes proposed by Cliff Villa into the previous draft which was provided by my letter dated May 7, 1997. A copy of Cliff's handwritten change pages, with some modifications by me, are also enclosed for reference.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Fransen".

Curt A. Fransen
Deputy Attorney General

CAF/lvh

Enclosure



MEMORANDUM OF AGREEMENT (MOA)

A. PARTIES

The parties to this MOA include the United States Environmental Protection Agency (EPA) and the State of Idaho (State) (collectively The Governments), the Union Pacific Railroad Company (Union Pacific) and the City of Kellogg, Idaho (City).

B. BACKGROUND/FACTS

1. EPA, the State and Union Pacific are parties to a Consent Decree entered September 12, 1995 in United States v. Union Pacific Railroad Co., Case No. CV95-0152-N-HLR (Consent Decree). The Consent Decree requires, in part, remediation activities on the Union Pacific Right-of-Way (ROW) within the Bunker Hill Superfund Site (Site) (approximately seven miles of the Wallace Branch) in accordance with the Union Pacific Statement of Work (SOW) and Union Pacific Remedial Action Work Plan (RAWP) attached thereto. Union Pacific is proceeding with remediation activities in accordance with the Consent Decree.

2. The Governments, through U.S. Army Corps of Engineers contractors, are engaged in other government financed remediation activities within the Site including the intended removal of tailings from Smelterville Flats and other areas for placement in the Central Impoundment Area (CIA) within the Site. The Governments intend to construct and utilize a temporary road on a portion of the ROW for transport of tailings by truck.

3. The City is engaged in the development of economic and recreational resources within the Site, including the construction of a recreational trail system within the Union Pacific ROW. The City is constructing a segment of the recreational trail system in the summer of 1997 pursuant to an agreement and easement and assistance from Union Pacific and a grant from the Idaho Department of Transportation. The City intends to pursue grants from the Idaho Department of Parks and Recreation and other sources to construct additional recreational trail segments within the Union Pacific ROW.

4. Union Pacific is seeking the issuance of a Certificate of Interim Trail Use ("CITU"), in conjunction with the Rails to Trails Conservancy, pursuant to the provisions of 16 U.S.C.A. 1247(d) for the branchline between Plummer and Mullan, Idaho (the Wallace Branch), which includes the ROW within the Site. Union Pacific has temporarily removed rail and ties from part of the ROW within the Site for cleanup activities in accordance with the Consent Decree but has not abandoned the Wallace Branch.

C. PURPOSE

The purposes of this MOA are to facilitate and coordinate the temporary use of a portion of the Union Pacific ROW by the Governments and their contractors for the construction and operation of a non-public road to transport tailings by truck; to ensure the completion of remediation requirements of the Consent Decree, SOW and RAWP on the affected portion; and to facilitate the City's construction of a trail within the Site and ROW.

D. ACTIONS

1.(a) Union Pacific authorizes the Governments and their Contractors to occupy the ROW between mileposts 64.24 and 65.74 and mileposts 66.44 and 66.67 (Occupied ROW) from April 1, 1997 through November 1, 2000 for the sole purpose of constructing and utilizing a non-public road to haul tailings by truck to the CIA. Immediately thereafter, but no later than November 1, 2000, the Governments shall integrate or remove the non-public road improvements, as appropriate, and perform all other actions upon the Occupied ROW that are necessary to meet the remediation requirements in the Consent Decree SOW and RAWP, including placing clean cover material over the areas designated for such cover according to the 1996 Annual Remedial Action Implementation Plan.

(b) For purposes of the foregoing, the Occupied ROW is defined as :

(1) The entire width of the ROW where a portion has been directly impacted by the construction and use of the haul road including the constructed road surface, road shoulders, service roads (used for access by support vehicles), and areas used for drainage facilities (culverts, drainage ditches, etc.);

(2) The entire width of the ROW where a portion has been directly impacted by the construction and use of two ROW crossings, by the Governments for access to the CIA, and two ROW crossings for use by Mine Timber, Inc. in Smelterville. The crossings for Government use are described as being at or near milepost 67.0 and 68.04. The crossings for Mine Timber use are described as being at or near milepost 66.63 and 66.72;

(3) The full width of the ROW within 50 feet of any of the areas described above; and

(4) Those areas of the ROW; that have been remediated by Union Pacific, are within 25 feet of the areas described in (3) above, and that have been shown by Government testing-sampling to contain concentrations of lead equal to or greater than 1,000 parts per million in the top twelve inches of surface materials.

After final use by the Governments, all areas described above that have not received clean barrier material to the thickness specified in the Consent Decree, will be tested-sampled by

the Governments for lead concentration levels in the top twelve inches of surface materials. Those areas that exhibit lead concentrations greater than or equal to 1,000 parts per million in the top twelve inches will receive a clean barrier consistent with the requirements of the Consent Decree.

(c) To the extent possible practicable, the construction and use of the non-public road shall accommodate the City's construction of the recreational trail on the ROW. Schedules for the two projects shall be coordinated so as to ensure the City may use any grant money obtained in accordance with the terms of the grant.

2. Subject to the rights granted to the Governments to temporarily use the ROW, Union Pacific shall continue to own and control the ROW, reserving to it, and its successors and assigns, the right to construct at any and all times and to maintain railroad tracks, fiber optic or signal lines and facilities, pipe, telephone, and electric pole and wire lines, over, under and across the ROW, in such a way as to provide for the Governments' temporary use of the ROW for the purposes specified in this MOA where reasonably practicable; it being understood that the right so reserved to Union Pacific, its successors, assigns and grantees, is retained along with the general right of Union Pacific, its successors, and assigns, to the use of the ROW for any purpose not inconsistent with the Governments' use of the ROW for the purposes herein described. Notwithstanding the foregoing, Union Pacific assumes no liability or responsibility as to the Governments' use of the ROW, which shall be at all times subject to the provisions of Paragraph 4 hereof. Union Pacific reserves for itself, its successors and assigns, any and all additional rights necessary to comply with a CITU covering the Wallace Branch and issued pursuant to the provisions of 16 U.S.C.A. 1247(d), it being understood and agreed that Union Pacific may transfer the ROW in fee to the holder of such a CITU or any other party, subject to this MOA. The parties specifically agree that this MOA is not a result of Union Pacific's abandonment of the ROW and it is executed by Union Pacific with this express reservation, and it is subject to Union Pacific's continuing intent to comply with any CITU issued under 16 U.S.C.A. 1247(d).

The authorization provided herein is limited to such rights as Union Pacific may have in the ROW and is granted without warranty, express or implied. No damages shall be recoverable from Union Pacific because of any dispossession of the Governments or because of failure of, or defect in, Union Pacific's title.

3. On or before December 31, 1997, Union Pacific shall deposit \$204,427.00 in an escrow account for use by the City as matching funds for grants to construct and maintain recreational trail segments within the ROW in the Site. This sum of money substantially equals the direct costs Union Pacific will save by not being required to complete the remediation requirements set forth in the Consent Decree SOW and RAWP for the ROW segments occupied by the non-public road. In the event the City does not utilize the escrow account proceeds to construct recreational trail segments by the end of the year 2000, the account proceeds shall be transferred to the State for deposit in the Bunker Hill Cleanup Trust Fund established by the Trust Fund Declaration of the State of Idaho dated May 2, 1994 (Attachment M, Consent Decree, United States v. ASARCO, Inc.,

No. CV94-0207-N-HLR (D. Idaho)) for the purpose of construction, operation and/or maintenance of recreational trail segments on the Wallace Branch ROW including the ROW within the Site.

54. EPA shall issue to Union Pacific a Certificate of Completion of the Remedial Action ("Certification") as specified in Section XV of the Consent Decree if (a) Union Pacific has met the requirements therein applicable to the ROW within the Site other than the remediation requirements pertaining to the Occupied ROW which have been assumed by and are to be completed by the Governments pursuant to Paragraph 1 of Section D, and (b) it has complied with the requirements to deposit \$204,427.00 in an escrow account pursuant to Paragraph 3 of Section D of this MOA. Such Certification shall not be delayed as a result of the construction and use of the non-public road by the Government.

45.4 Following Certification of Completion of the Remedial Action as described in Paragraph 8 of this MOA and as specified in Section XV of the Consent Decree, Union Pacific shall not be liable for releases of hazardous substances that result solely from the Governments' use of the right of way to transport hazardous substances from areas not on Union Pacific property for placement in the CIA. This provision does not otherwise modify the United States' Post-Certification Reservations set forth in Paragraph 87 of the Consent Decree, or the State of Idaho's Post-Certification Reservations set forth in Paragraph 89 of the Consent Decree.

6. Throughout the Governments' occupancy of the ROW, Union Pacific shall not be liable to third parties for any damages caused by acts of the Governments or their contractors. In this regard, the Parties recognize the applicability of Section H.6, Insurance--Liability to Third Parties, of Department of Army contract W68-94-D-0005.

67. This MOA shall terminate upon completion by the Governments of their obligations to remove the private road improvements and complete remediation of the Occupied ROW as set forth in Paragraph 1 of Section D of this MOA unless sooner terminated, provided however that the Governments' indemnity obligations hereunder shall survive termination and remain in effect for so long as necessary to provide the required indemnification.

E. EFFECT OF THIS AGREEMENT ON CONSENT DECREE SOW AND RAWP

This MOA represents a minor modification to the RAWP, and shall not be construed to materially alter the SOW. In any action to enforce the terms of the Consent Decree, such Consent Decree shall be interpreted by the parties consistently with the RAWP, as modified by this MOA, giving full effect to both the Consent Decree and the RAWP as modified. Nothing in this MOA shall be construed to alter the rights and obligations established by the Administrative Order Directing Compliance with Request for Access, Docket No. 10-96-0082-CERCLA (Sept. 3, 1996). Nothing in this MOA shall create any rights or obligations for any person not a party to this MOA.

RANDALL F. SMITH, DIRECTOR
U.S. Environmental Protection Agency, Region X
Office of Environmental Cleanup

Date

WALLACE N. CORY, P.E., ADMINISTRATOR
Idaho Department of Health and Welfare
Division of Environmental Quality

Date

C. PURPOSE

The purposes of this MOA are to facilitate and coordinate the temporary use of a portion of the Union Pacific ROW by the Governments and their contractors for the construction and operation of a non-public road to transport tailings by truck; to ensure the completion of remediation requirements of the Consent Decree, SOW and RAWP on the affected portion; and facilitate the City's construction of a trail within the Site and ROW.

D. ACTIONS

1. (a) Union Pacific authorizes the Governments and their Contractors to occupy the ROW between mileposts 66.74 and 66.74 and mileposts 66.41 and 66.67 (Occupied ROW) from April 1, 1997 through November 1, 1999 2000 for the sole purpose of constructing and utilizing a non-public road to haul tailings by truck to the CLA. Immediately thereafter, but no later than November 1, 1999 2000, the Governments shall integrate or remove the non-public road improvements, as appropriate, and perform all other actions upon the Occupied ROW that are necessary to meet the remediation requirements in the Consent Decree SOW and RAWP, including placing clean cover material over the areas designated for such cover according to the 1996 Annual Remedial Action Implementation Plan.

(b) For purposes of the foregoing, the Occupied ROW is defined as:

(1) The entire width of the ROW where a portion has been directly impacted by the construction and use of the haul road including the constructed road surface, road shoulders, service roads (used for access by support vehicles), and areas used for drainage facilities (culverts, drainage ditches, etc.);

(2) The entire width of the ROW where a portion has been directly impacted by the construction and use of two ROW crossings by the Governments for access to the CLA and two ROW crossings for use by Mine Timber, Inc. in Smelterville. The crossings for Government use are described as being at or near milepost 67.0 and 67.04. The crossings for Mine Timber use are described as being at or near mileposts 66.63 and 66.72.

(3) The full width of the ROW within 50 feet of any of the areas described above and

(4) Those areas of the ROW that have been remediated by Union Pacific, are within 25 feet of the areas described in (3) above, and that have been shown by Government to contain concentrations of lead equal to or greater than 1,000 parts per million in the top twelve inches

surface materials.
of soil

After final use by the Governments, all areas described above that have not received clean barrier material to the thickness specified in the Consent Decree will be tested by the Governments for lead concentration levels in the top twelve inches. Those areas that exhibit lead concentrations greater than or equal to 1,000 parts per million in the top twelve inches will receive a clean barrier consistent with the requirements of the Consent Decree.

(c) To the extent ^{practically} possible, the construction and use of the ~~non-public~~ private road shall accommodate the City's construction of the recreational trail on the ROW. Schedules for the two projects shall be coordinated so as to ensure the City may use any grant money obtained in accordance with the terms of the grant.

2. Subject to the rights granted ^{the ROW} to the Governments to temporarily use the ROW, Union Pacific shall continue to own and control it, reserving to it, and its successors and assigns, the right to construct at any and all times and to maintain railroad tracks, fiber optic or signal lines and facilities, pipe, telephone, and electric pole and wire lines, over, under and across the ROW, in such a way as to provide for the Governments' temporary use of the ROW for the purposes specified in this MOA where reasonably practicable, it being understood that the right so reserved to Union Pacific, its successors, assigns and grantees, is retained along with the general right of Union Pacific, its successors, and assigns, to the use of the ROW for any purpose not inconsistent with the Governments' use of the ROW for the purposes herein described. Notwithstanding the foregoing, Union Pacific assumes no liability or responsibility as to the Governments' use of the ROW, which shall be at all times subject to the provisions of Paragraph 4 hereof. Union Pacific reserves for itself, its successors and assigns, any and all additional rights necessary to comply with a CITU covering the Wallace Branch and issued pursuant to the provisions of 16 U.S.C.A. 1247(d), it being understood and agreed that Union Pacific may transfer the ROW in fee to the holder of such a CITU or any other party, subject to this MOA. The parties specifically agree that this MOA is not a result of Union Pacific's abandonment of the ROW and it is executed by Union Pacific with this express reservation, and it is subject to Union Pacific's continuing intent to comply with any CITU issued under 16 U.S.C.A. 1247(d).

The authorization provided herein is limited to such rights as Union Pacific may have in the ROW and is granted without warranty, express or implied. No damages shall be recoverable from Union Pacific because of any dispossession of the Governments or because of failure of, or defect in, Union Pacific's title.

3. On or before ~~December 31, 1997~~, Union Pacific shall deposit ~~\$204,427.00~~ in an escrow account for use by the City as matching funds for grants to construct and maintain recreational trail segments within the ROW in the Site. This sum of money substantially equals the direct costs Union Pacific will save by not being required to complete the remediation requirements set forth in the Consent Decree SOW and RAWP for the ROW segments occupied by the non-public road. In the event the City does not utilize the escrow account proceeds to construct recreational trail segments by the end of the year 2000, the account proceeds shall be transferred to the State for deposit in the Bunker Hill Cleanup Trust Fund Established by the Trust Fund Declaration of the State.

of Idaho dated May 2, 1994 (Attachment M, Consent Decree, United States v. ASARCO, Inc., No. CV94-0207-N-HLR (D. Idaho)) for the purpose of construction, operation and/or maintenance of recreational trail segments on the Wallace Branch ROW including the ROW within the Site.

4. ~~The Governments and their contractors assume the risk and shall indemnify and hold harmless Union Pacific, its officers, agents and employees, against and from any and all loss, damages, claims, demands, actions, causes of action, costs, attorney fees, fines, penalties, and expenses of whatsoever nature (hereinafter "Loss") which may result from: (a) injury to or death of persons whomsoever (including officers, agents and employees of Union Pacific and of the Governments, as well as other persons); (b) loss of or damage to property whatsoever (including the contamination of adjacent property); or (c) violation by the Government of any federal, state or local law, regulation, or enactment, when such loss is due to or arises in connection with or as a result of:~~

- ~~(1) the construction and existence of the non-public road;~~
- ~~(2) any work done by the Governments on or in connection with the non-public road;~~
- ~~(3) the use of the non-public road by the Governments, their contractors, agents, employees, patrons or invitees, or by any other person; or~~
- ~~(4) the breach of any covenant or obligation assumed by or imposed on the Governments pursuant to this MOA or the failure of the Governments to promptly and fully do any act or work for which the Governments are responsible pursuant to this MOA.~~

5. ~~Following Certification of Completion of the Remedial Action as described in Paragraph 4 of this MOA and as specified in Section XV of the Consent Decree, Union Pacific shall not be liable for releases of hazardous substances that result solely from the Government's use of the right of way to transport hazardous substances from areas not on Union Pacific property for placement in the CMA. This provision does not otherwise modify the United States Post-Certification Reservations set forth in Paragraph 87 of the Consent Decree or the State of Idaho's Post-Certification Reservations set forth in Paragraph 89 of the Consent Decree.~~

4. ~~EPA shall issue to Union Pacific a Certificate of Completion of the Remedial Action ("Certification") as specified in Article Section XV of the Consent Decree if (a) it Union Pacific has met the requirements therein applicable to the ROW within the Site including other than the remediation requirements pertaining to the Occupied ROW which have been assumed by and are to be completed by the Governments pursuant to Paragraph 1 of Section II, and (b) it has complied with the requirements to deposit \$204,437.00 in an escrow account pursuant to Paragraph 3 of Section D of this MOA. Such Certification shall not be delayed as a result of the construction and use of the non-public road by the Government.~~

6. INSERT NEW PLE See attachment

⑦ This MOA shall terminate upon completion by the Governments of their obligations to remove the private road improvements and complete remediation of the Occupied ROW as set forth in Paragraph 1 of Section D of this MOA unless sooner terminated, provided however that the Governments' indemnity obligations hereunder shall survive termination and remain in effect for so long as necessary to provide the required indemnification.

E. EFFECT OF THIS AGREEMENT ON CONSENT DECREE SOW AND RAWP

This MOA represents a minor modification to the RAWP, and shall not be construed to materially alter the SOW. In any action to enforce the terms of the Consent Decree, such Consent Decree shall be interpreted by the parties consistently with the RAWP, as modified by this MOA, giving full effect to both the Consent Decree and the RAWP as modified. Nothing in this MOA shall be construed to alter the rights and obligations established by the Administrative Order Directing Compliance with Request for Access, Docket No. 10-96-0082-CERCLA (Sept. 3, 1996). Nothing in this MOA shall create any rights or obligations for any person not a party to this MOA.

SIGNATORIES

RANDALL F. SMITH, DIRECTOR
U.S. Environmental Protection Agency Region 8
Office of Environmental Cleanup

Wally Cony DE, Administrator
IDHW
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Union Pacific MOA

New paragraph # 6:

Throughout the Governments' occupancy of the ROW, Union Pacific shall not be liable to third parties for any damages caused by acts of the Governments or their contractors. In this regard, the Parties recognize the applicability of Section H.6, Insurance--Liability to Third Parties, of Department of Army Contract W68 94-D-0005.